Supreme Court, U.S.
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No. 94-514

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent does not oppose our petition, which seeks review of the question whether, in a prosecution under 18 U.S.C. 1001 for making false statements within the jurisdiction of a federal agency, the materiality of those statements is an issue to be resolved by the court rather than the jury. To the contrary, respondent agrees, in a cross-petition filed in No. 94-6571, that that question "merits this Court's consideration to reexamine this important federal constitutional question over which the courts of appeal are now irreconcilably split." 94-6571 Cross-Pet. 13.*

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* Our arguments for denial of the cross-petition are set forth in a separate brief in opposition filed in that case.

1. Respondent admits that the Ninth Circuit's holding on the materiality issue "conflict[s] with all other United States Courts of Appeal." 94-6571 Cross-Pet. 8. Respondent states, however, that the Ninth Circuit's holding accords with the decisions of some state courts. *Id.* at 10-11, citing *State* v. *Anderson*, 603 A.2d 928, 935 (N.J. 1992) (dictum); *People* v. *Hedgecock*, 795 P.2d 1260, 1266-1268 (Cal. 1990); *Commonwealth* v. *McDuffee*, 398 N.E.2d 463, 467-470 (Mass. 1979). The state court decisions, of course, do not involve the federal false statement statute; instead, many concern the materiality element of state perjury statutes. See Annotation, *Materiality of Testimony Forming Basis of Perjury Charge as Question for Court or Jury in State Trial*, 37 A.L.R.4th 948, 953-958 (1985). Because many of those state-court decisions are founded upon interpretation of the federal Constitution, however, this Court's resolution of the question presented in our petition should eliminate confusion among the state courts as well as the federal courts.

2. Respondent argues that this Court's decision in *Sinclair* v. *United States*, 279 U.S. 263, 284-285 (1929), has been superseded by more recent decisions of this Court holding that the right to a jury trial applies to every fact necessary for conviction. 94-6571 Cross-Pet. 12-13. That argument incorrectly assumes that materiality is a question of fact. As explained in our petition (Pet. 10-12), *Sinclair* and *Kungys* v. *United States*, 485 U.S. 759 (1988), teach that materiality is an issue to be decided by the court because it is an issue of law. See *Kungys*, 485 U.S. at 772; *Sinclair*, 279 U.S. at 298-299.

Respondent asserts that *Kungys* is inapposite because it involved a civil denaturalization proceeding. 94-6571 Cross-Pet. 10-11. He does not explain, however, why

materiality should be deemed a question of law in civil cases but a question of fact in criminal cases. This Court has never suggested that the classification depends on whether the underlying proceeding is civil or criminal. *Kungys*'s reaffirmation of *Sinclair* is therefore fully instructive here. See Pet. 10-11.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1994